

February 19, 2003

HAND DELIVER

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

Re: The Berkshire Gas Company, D.T.E. 02-81

Dear Secretary Cottrell:

On November 27, 2002, The Berkshire Gas Company ("Berkshire" or the "Company") filed with the Department of Telecommunications and Energy (the "Department") its Petition for Approval of a Gas Purchase Agreement between The Berkshire Gas Company and BP Energy Company (the "Petition"). The Petition sought approval of the Gas Purchase Agreement between Berkshire and BP Energy Company ("BP Energy") dated as of November 1, 2002 (the "Purchase Agreement"). Pursuant to the procedural schedule established by the Hearing Officer, on February 12, 2003 Berkshire submitted its Initial Brief in support of the Petition. The Company's Initial Brief describes the procedural history of this proceeding. The Attorney General of the Commonwealth (the "Attorney General") also filed an initial brief in this proceeding on February 12, 2003 wherein the Attorney General described his opposition to the Petition. This reply brief is filed in response to the Initial Brief of the Attorney General pursuant to the procedural schedule established by the Hearing Officer.

The Company's Initial Brief described how the execution of the Purchase Agreement was consistent with the public interest in that the BP Energy supply resource is consistent with the Company's portfolio objectives and compares favorably to the range of alternative resources reasonably available to the Company and its customers. The Company's Initial Brief described, in detail, the comprehensive and broad competitive solicitation conducted by Berkshire in connection with the replacement of expiring gulf supply contracts. Co. In. Br., pp. 5-9. Berkshire demonstrated that it implemented a well-structured solicitation process that solicited bids from a wide range of bidders and that resulted in the receipt of a substantial number of bids. Id. at 9. The Company then applied a rigorous bid analysis process that appropriately considered price and non-price terms. The Company also addressed a question raised by the

Hearing Officer, namely the question of diversity of supply and reliability. *Id.* at 9-10. Berkshire explained that it addressed reliability and diversity of supply by looking beyond merely the identity of particular bidders. Instead, Berkshire engaged in a critical examination of the resources behind particular bids, the ability and willingness of bidders to perform and the ability of bidders to deliver supply to the various “legs” of the Tennessee Gas Pipeline Company (“Tennessee”) system. *Id.* Berkshire explained that credit quality of bidders, the production resources and reserves available to bidders, their willingness to commit to more favorable contract terms and delivery capability were all considered in analyzing reliability.

The Company explained that BP Energy was the superior proposal in terms of each of these attributes. BP Energy maintained a favorable credit rating at the time of the solicitation while other bidders were experiencing credit concerns and, indeed, were withdrawing from business lines in response. *Id.* at 7-8. Berkshire recognized that BP Energy was the “largest producer and reserve holder in North America and maintains substantial resources on all three legs of the Tennessee system.” *Id.* at 8. Another bidder could not deliver on the 800 leg of the Tennessee system where approximately 21% of the Company’s supply is delivered. *Id.* at 7, n. 3. Berkshire also explained its successful operational experience with BP Energy, BP Energy’s willingness to commit to a higher standard of performance and the steps available by reason of the Company’s highly flexible resource plan in the extremely unlikely event that BP Energy does not fulfill its obligations pursuant to the Purchase Agreement. *Id.* at 10, n. 5. In sum, Berkshire explained that the execution of the Purchase Agreement addressed reliability and diversity objectives in a manner that was superior to all other bids received. Berkshire noted that the “mechanical” application of forced diversity of suppliers would, in fact, frustrate the achievement of these important goals. *Id.*

The Attorney General raises two arguments in his Initial Brief. First, the Attorney General cites to a recent decision of the Department with respect to Berkshire that suggests that the Company should not limit the purchase of its gas supply requirements to a single supplier. AG In. Br., p. 2. Berkshire was fully aware of this decision and its witness, Ms. Karen Zink, explained that the Company “would have preferred that an alternative bidder had been the most attractive bidder in response to the [Company’s solicitation] so that a measure of diversity. . . could have been secured.” Exh. BG-1, p. 10. Berkshire’s Initial Brief explained that the Department’s decision in Commonwealth Gas Company, D.P.U. 94-174-A (1996) always described “diversity and reliability” as a single consideration. Co. In. Br., p. 10. Berkshire rigorously tested the market for gas supplies examining a variety of price and non-price factors all intended to secure a resource that contributed to a least cost, flexible and reliable plan. The Company cannot control the nature of the market or the response to a request for proposals. The Company properly determined that the BP Energy Purchase Agreement advances the

goals of cost and reliability. The Company balanced the superior terms of the BP Energy proposal, together with the flexibility afforded by its current resource plan, and determined that this replacement resource contributes to a least cost, reliable gas supply.¹ The Attorney General merely suggests that the Company should have considered “other favorable responses.” AG In. Br., p. 2. The Company, in fact, did consider these other bids and determined that BP Energy, with its superior credit quality, vast resources, superior access to the Company’s transportation resources and willingness to accept a higher contractual obligation in terms of reliability was the resource that would provide the greatest reliability to customers. None of the other “responses” described by the Attorney General provided this combination of factors in terms of reliability. Accordingly, the Department should accept the Company’s reliability analysis and approve the Purchase Agreement.²

The Attorney General’s second argument is that somehow the Purchase Agreement was not an “arm’s length” transaction. AG In. Br., p. 2. The Attorney General supports this assertion by merely noting that the Company and BP Energy are parties to an alliance arrangement with respect to the optimization of the resource portfolios of Berkshire and certain of its affiliates. See The Berkshire Gas Company, D.T.E. 02-19 (2002). The Attorney General’s confused arguments should be ignored. First, Berkshire and BP Energy are not affiliates under either the so-called “S.E.C.” definition or the Department’s Standards of Conduct. Second, the Company expressly excluded the Purchase Agreement from the pricing and term provisions of the alliance. Exh. AG 1-1 Further, while BP Energy may seek to “optimize” Berkshire’s rights under the Purchase Agreement, these rights are in no way different than they would be for another gulf supplier. Exh. AG 1-9 Third, the Company had no basis to exclude BP Energy from the solicitation that resulted in the Purchase Agreement and based its selection of BP Energy upon a sound and fully articulated analysis of price and non-price factors. Finally, the alliance provides no basis for favoritism toward BP Energy. The Department’s order in the recent review of the alliance held that the Company had not presented any evidence with respect to margin sharing and, accordingly, held that no margins from the alliance should be shared until further Department review.

¹ The Purchase Agreement contains a relatively short term. Exh. BG-1, p. 8; Exh. BG-2, §6.1. The term coincides with other critical dates such as the term of the alliance for optimizing gas supply and the Department’s transition period. Exh. BG-1, p. 9. If Berkshire were required to respond to issues associated with BP Energy’s role as primary supplier, the shorter term of the Purchase Agreement would facilitate such a response.

² The Department should be wary of the Attorney General’s proposed alternative remedy of requiring the Company to somehow commence negotiations with another bidder. AG In. Br., p. 2. The Company notes that this proposed “remedy” will either require the Company to contract for unnecessary supply or place Berkshire at risk of loss of the BP Energy arrangement as the approval of only a portion of the volumes to be delivered pursuant to the Purchase Agreement might be properly interpreted by BP Energy as a *de facto* rejection. Cf. Exh. BG-2, §20.3.

Mary L. Cottrell, Secretary
February 19, 2003
Page 4

Berkshire Gas, D.T.E. 02-19, p. 23. If anything, the existence of the alliance weighed against BP Energy in the course of Berkshire's review of the various proposals. Berkshire, however, found that the substantial price and reliability opportunities afforded by the BP Energy proposal substantially overcame this initial prejudice. Accordingly, the Department should reject the Attorney General's concerns with respect to the need for added scrutiny of the Purchase Agreement.

In sum, the Company's evidentiary presentation and argument in its Initial Brief and this reply brief demonstrate that the Purchase Agreement is consistent with the public interest in that the supply source is consistent with the Company's portfolio objectives and compares favorably to the range of alternatives reasonably available to the Company and its customers. Accordingly, for all these reasons, the Company respectfully submits that the Department should approve the Purchase Agreement and take such other action as may be necessary and appropriate.

Very truly yours,

BROWN RUDNICK BERLACK ISRAELS LLP

By: _____
James M. Avery

JMA/cdw

cc: Jesse S. Reyes, Esq., Hearing Officer (2 via hand delivery)
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